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ABSTRACT

This special theme issue outlines the history of discrimination against traditional Native American religions, including recent Supreme Court decisions. "Discrimination and Native American Religious Rights," by Senator Daniel K. Inouye, discusses the compelling government interest in eradicating discrimination and describes two Supreme Court decisions denying constitutional protection of tribal sacred sites and the practices of minority religions. "The Repression of Indian Religious Freedom," by Patricia Nelson Limerick, examines the history of federal policies suppressing Indian religious liberty. Public policy long assumed that the "civilization" of the Indians and their conversion to Christianity were inseparable. During the 19th century, a missionary movement swept through the United States, and federal funds for Indian education provided partial support for missionary schools. The question of religious liberty was viewed as a matter among Christian churches and not applicable to Indian spiritual practices. In the 1880s, the Department of the Interior created courts of Indian offenses, which targeted both religious practices and customs that were considered antithethical to the work ethic (such as sharing property). The campaign against Indian religions was ultimately a campaign against the Indian family because it sought to assimilate the younger generation by removing the influence of the elders. This issue also includes an explanation of the Native American Free Exercise of Religion Act of 1993, introduced by Senator Inouye, and a list of publications on federal Indian education laws, tribal government, and tribal economic development. (SV)

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FREEDOM OF RELIGION: A TIME OF JUSTICE

SECOND SPECIAL EDITION

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NARF LEGAL REVIEW
Native American Rights Fund

SECOND SPECIAL EDITION ON FREEDOM OF RELIGION: A TIME FOR JUSTICE

"Injustice anywhere is a threat to justice everywhere."
Martin Luther King, Jr.

Editors Prologue: Guaranteed rights to religious freedom under the First Amendment of the United States Constitution should have precluded the need for legislative protection for religious freedom for American Indians. However, the Government's past discriminatory policies perpetuated the nation's ignorance of and prejudices against Indian religions and tradition. With the passage of the American Indian Religious Freedom Act (AIRFA) in 1978, the United States resolved " . . . to protect and preserve for American Indians their inherent right of freedom to believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and freedom to worship through ceremonials and traditional rites." Since the passage of AIRFA, the United States government and its agencies have applied a limited and inconsistent interpretation and application of the Act which has in turn generated ineffective judicial protection for American Indian religions, as witnessed by the recent Supreme Court decisions.

This special issue of the NARF Legal Review seeks to educate the reader as to why Congressional protection is needed and as to why the United States government must be legally and morally committed to preserving American Indian, Eskimo, Aleut, and Native Hawaiian religious rights and culture.

Volume 18, No. 2 Summer 1993

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"I do not see a delegation for the four-footed. I see no seat for the eagles. We forget and we consider ourselves superior. But we are after all a mere part of the Creation. And, we must consider to understand where we are. And, we stand somewhere between the mountain and the ant. Somewhere and only there as part and parcel of the Creation."

Chief Oren Lyons
Onondaga Faithkeeper 1977

DISCRIMINATION AND NATIVE AMERICAN RELIGIOUS RIGHTS

by Senator Daniel K. Inouye

I. Introduction

Mankind has a dark side—the age-old tendency to discriminate against others who are different. This Article shares my perspective as a United States Senator on the problem of discrimination and how it affects Native American human rights issues under the jurisdiction of the Senate Select Committee on Indian Affairs.

A pressing human rights concern of the Committee at this time is the specter of renewed religious discrimination against American Indian tribal religion in the wake of the dramatic retreat from First Amendment protection by the Supreme Court in *Employment Div. Dept. of Human Resources of Oregon v. Smith.*[1] This case is a noteworthy example of the Court's denial of protection for a traditional American Indian religion that predates in antiquity the writing of the First Amendment itself.

The unique cultures of America's Native peoples are inseparable from their religions.[2] Religion pervades the traditional way of life of American Indians.[3] These religions have been historically suppressed by the United States government in ways unprecedented for other religions. *Smith* seriously weakened religious freedom in general by discarding long-standing First Amendment standards. This resulted in the

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immediate banding together of church groups and religious organizations in a move to restore the First Amendment balancing test.[4] The proposed legislation which resulted, however, does not address unique, historical Indian religious discrimination problems. There remains a need for separate legislation to protect free exercise rights of Native Americans, as well as to ensure these citizens the guaranteed protection of all other constitutional provisions.

This Article first discusses the compelling government interest in eliminating discrimination and the necessity for all three branches of the federal government to act together to combat intolerance and prejudice. Secondly, it focuses on the problem of religious discrimination against Native Americans, which has intensified in the wake of recent decisions of the Supreme Court. The issue of religious intolerance and discrimination has been a serious human rights problem for indigenous peoples since Christopher Columbus set foot in the New World. Congress has now been relegated the responsibility to legislatively grant statutory protection for our original inhabitants.[5]

II. The Government's Interest In Eradicating Discrimination

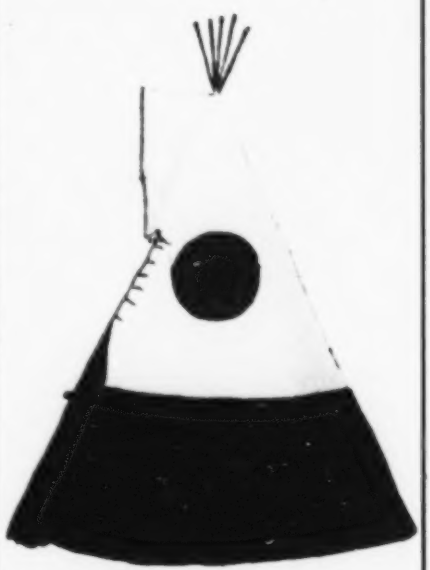
A. The Evils of Discrimination

The human spirit is a wonderful thing. At its best, the good qualities of our fellow citizens may serve as an example to inspire us to live up to our lofty ideals and goals. Unfortunately, however, mankind had its frailties. The history of our species is fraught with instances where unwarranted hatred and fear has precipitated great misery upon the innocent. Much of this darkness in the human heart is manifested by discrimination.

Discrimination is defined as "[u]nfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion. [6] When effected through the machinery of the state, it can have devastating impacts upon people, ranging from deep psychological scars upon young schoolchildren,[7] to a separation of the races,[8] to the extreme of racial or cultural genocide. For victims of discrimination, it matters little whether these impacts result from invidious state action, or whether they are inflicted by less obvious applications of facially neutral rules.[9]

In the United States, discrimination is illegal. It is prohibited by the Fifth and Fourteenth Amendments to the Constitution as well as by numerous federal laws. Unfortunately, despite our commitment to these Equal Protection ideals, discrimination has had a long and troubling history in this country. The manner in which America, the world's leading democracy, treats our own racism and prejudice reveals much to the international community concerning our attitude about individual freedom and human rights. This country's challenge in the war against discrimination is an on-going one, as seen from the present resurgence of racism and intolerance. It is a continual struggle to eradicate discrimination—a struggle that requires vigilant commitment from all three branches of government.

Presently there is a disturbing trend in many areas of our country in the direction of intolerance and racism. Especially objectionable is an apparent lack of leadership by all three branches of our government in combating this menace to our society. When the executive branch weakens its resolve to enforce civil rights laws, or the judiciary retreats from prior rules of law and dilutes fundamental freedoms enshrined in the Bill of Rights, it falls upon the Congress to increase its vigilance in opposing discrimination through legislation.



History teaches the importance in every society of preventing the occurrence of outbreaks of discriminatory acts and practices and of the need to vigorously enforce human rights guarantees. In those nations which have permitted equal rights for all its citizens to lapse due to lack of government enforcement, serious human violations have quickly appeared. Almost universally, these violations have had rippling effects infringing on the rights of all citizens. Once minority groups fell victim to officially sanctioned discrimination, it was not long before death camps arose in nations such as Cambodia, Nazi Germany and the U.S.S.R. In many newly-established nations that formerly were colonies, while freedom for the majority was achieved, the indigenous population was excluded from the body politic. Widespread cultural and racial genocide was the consequence. This is presently evident in some Central and South American nations, as well as in South Africa.

If America is to provide strong moral leadership in the world today as a much needed beacon for freedom, our indigenous policies need to be vastly different from countries such as South Africa, which have questionable standing in the international community as a result of mistreatment of their original inhabitants. Like us, many nations are former colonies, and the way in which they treat their indigenous populations reflects their intrinsic values. Even if constitutional rights are ensured for a majority of society, a denial of constitutional protection for indigenous people is a heavy moral weight that may cloud a democracy's human rights foreign policy.

America's treatment of its native people is especially important, for domestic and international reasons. Domestically, it is true that all races and ethnic groups have historically faced various forms of discrimination in the United States, but the manner

in which our country treats its indigenous native peoples provides a general barometer of our overall commitment to justice and freedom. As Felix S. Cohen, the "father" of Federal Indian law aptly stated in 1953, "[l]ike the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith. . . ."[10] Cohen realized that unless our government institutions and social policy can protect America's smallest, poorest and weakest minority group from discrimination and injustice, they may also lack the strength and will to accord equal protection for the rest of society. What may be a trickling stream when one constitutional right is lost or the rights of one group are taken away, may become a tidal wave when other rights are also denied.

Cohen's "miner's canary" concern has proven true in the area of religious freedom, where the Supreme Court recently stripped Native Americans of free exercise rights in both *Lyng v. Northwest Indian Cemetery Protective Association*[11] and *Smith*.[12] These troubling cases not only pave the way for unchecked religious discrimination against Native Americans who have already suffered a long and shameful history of government religious suppression, but they also seriously weaken religious liberty for all Americans.

B. The Equal Protection Remedy

The Fourteenth Amendment to the United States Constitution[13] guarantees that states will not deny individuals either due process or the equal protection of the law. The Fifth Amendment[14] binds the federal government to those same assurances. Equal protection of the law assures that persons who are similarly situated will be treated in a similar manner.[15] The Founding Fathers of our nation perceived that, under our democratic system, there existed a real danger of oppression to which minority groups would be subjected by the rule of the majority. The creation of the Equal Protection Clause was seen as a way to eliminate this threat and correspondingly protect the rights of minorities.

Although the Fifth and Fourteenth Amendments were created to protect minority freedoms, it was not until recently that the courts have construed the Equal Protection Clause in a manner consistent with this original intent. A pertinent example of the narrow interpretation the judiciary has taken in this regard occurred in 1896 when the Supreme Court approved the "separate but equal" doctrine in *Plessy v. Ferguson*.[16] That antiquated doctrine authorized invidious racial segregation and discrimination against African Americans to exist as a matter of basic social policy. This fostered immeasurable harm to

minorities and demonstrated that sometimes even a revered institution such as the United States Supreme Court cannot rise above prevailing social prejudices of the day. The Court justified the "separate but equal" doctrine with only thinly-veiled judicial sophistry.

> ***We consider the underlying fallacy of the plaintiff's argument to consist of the assumption that the enforced separation of the two races stamps the colored races with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chose to put that construction upon it.***[17]

The soul-crushing racism of the "separate but equal" doctrine continued unabated in the United States, without question from the executive and legislative branches until 1953. In that year Thurgood Marshall argued and won the landmark case of *Brown v. Board of Education*.[18] In *Brown*, the Supreme Court recognized that segregation of schoolchildren on the basis of race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"[19] and held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[20]

It is difficult today for us to contemplate how our Supreme Court ever resolved to deny important human rights safeguards to many of our citizens, so repugnant is the former interpretation of the Equal Protection Clause to contemporary beliefs. The harm suffered by millions of people was real and remains a permanent scar in the lives of many Americans today. For the sake of those victims and any possible future victims, we must be vigilant against future confusion in affording equal treatment for all citizens under the law.

Other examples demonstrate that breaches in equal protection principles, although they be of brief duration, may have lasting adverse affects upon the casualties of discrimination. At the beginning of World War II, the United States government removed about 120,000 Japanese-Americans from their homes and placed them in internment camps. This mass confinement was a serious curtailment of the civil rights of this minority group, effected solely on the basis of race and without regard for the constitutional rights of American citizens. The United States Congress authorized this unjust policy, and it was in turn implemented by the executive branch of our government. It was reviewed and approved by the Supreme Court in *Mirabayashi v. United States*[21] and in *Korematsu v. United States*.[22] Although it is shocking for us today to realize that an

entire ethnic group was incarcerated, at one time in our history, for no reason other than its racial affiliation, it was not until one generation later, in 1988, that this miscarriage of justice was rectified when Congress acted to grant reparations to the internees.[23]

Traditionally, in analyzing equal protection challenges, the Court applies a two-tier level of review.[24] The extent to which a law must satisfy the Equal Protection Clause is dependent upon a determination of the purpose that was intended by the legislation and the relationship that the different treatment has to achieving the particular governmental aim.[25]

The mere rationality level of review is applied to classifications made on the basis of economics or other social legislation. Such laws are subject only to very limited review. There is a presumption that the law is valid. A challenger must show that the law has no rational relationship to any legitimate government objective.[26]

C. The Equal Protection Standard of Review and the American Indian

When a law affects a suspect classification or places a significant burden on the exercise of a fundamental right, it will be strictly scrutinized and upheld only if it is necessary to achieve a compelling state objective and no less burdensome means are available to achieve that end.[27] There is no longer a presumption of constitutionality, requiring the government to satisfy a heavy and difficult burden. Classifications based upon race and national origin have been held to be suspect, requiring this stringent type of review.[28]

Suspect classes are determined by considering factors such as a history of pervasive discrimination against the class, the stigmatizing effect of the classification, the fact that the classification is based on an immutable characteristic beyond a person's ability to control, and the consideration that the discrimination is against a discrete and insular minority.[29] In order to qualify as a

suspect class, the group of persons affected by the classification must be somehow disadvantaged because of prior discriminatory treatment.[30]

Recently the Court has reviewed several cases in which the judiciary declined to treat with deference legislative determinations creating the affected classifications. An intermediate level of review appears to have been employed—such classifications must be substantially related to an important government interest.[31] This standard of review has been applied to classifications affecting gender and illegitimacy.[32]

It cannot be disputed that the American Indian is entitled to be treated the same as other United States citizens under the Constitution. Early Supreme Court decisions such as *Yick Wo v. Hopkins*[33] and *Wong Wing v. United States*[34] clearly established that the guarantees of the Equal Protection Clause applied universally "to all persons within the territorial jurisdiction of the United States."[35] Yet in considering equal protection challenges in cases affecting Indians, the analysis used by the courts differs from the traditional equal protection standard of review, regardless of whether these claims are brought under the United States Constitution or the Indian Civil Rights Act.[36]

Legislation affecting the American Indian is enacted to deal with the "so-called 'Indian problem.' [W]e often talk about the 'Indian problem' as if it were a disease. . . ."[37] Early equal protection cases established that legislation affecting Indians was constitutionally valid as long as it was based, not on race, but instead on "the political or ancestral affiliation of an individual to a tribe. If that affiliation were severed, the individual would no longer be considered an Indian within the meaning of the legislation."[38]

Modern federal court decisions have analyzed equal protection as it applies to Indians in an unusual manner. Rather than considering such legislation as classifications based on race, such laws are held to intend to promote the "trust responsibility" that the federal government has toward Indians who either are members of tribes that fall within the United States' trust relationship, or who have ancestral ties to persons who are tribal members. Courts then test this type of legislation with a standard of review that is not applied to other classifications. Laws are valid if they are "rationally" related to achieving Congress' "unique" obligation toward Indians.[39]

My personal opinion is that as long as we profess to strive to maintain democratic principals and seek to provide leadership for the free world, we must not acquiesce to the existence of discrimination against any group within our society, and especially not against our original inhabitants. As stated by one commentator: "What is needed is a new perception of the Indian, a perception of the Indian not as a problem to be corrected, but as peoples with rights, duties, and powers."[40]

III. RELIGIOUS DISCRIMINATION AGAINST NATIVE AMERICANS

A. History

Religious intolerance and suppression of tribal religions of Native Americans in the United States is not new. In fact, this form of discrimination has characterized the relationship between our indigenous population and newcomers from Europe for the past 500 years. On his first day in the Western Hemisphere, Christopher Columbus reflected the prevailing view of religious intolerance when he penned his impression of the Indians he encountered: "I believe that they would easily be made Christians

because it seemed to me that they had no religion."[41] In the minds of Europeans, tribal religions of the New World were inferior.

> When white men first witnessed Indians impersonating animal spirits in costume and dance, and worshipping rocks and rainbows, they failed to see this as a deep form of religious worship. To their Christian minds, these were deplorable pagan rites. Worship of more than one deity, and sacrificial offerings, directed at the natural world, stamped Indians as a misguided, lesser form of mankind. Here were Christless heathens crying to be rescued from eternal damnation.[42]

Thus, it is not surprising—especially given Europe's own heritage of religious discrimination among unpopular Christian denominations and against non-Christian world religions—that intolerance became a basic feature in the Pilgrims' and other colonists' relationship with the Indians. Indeed, although early settlers came to America to escape religious persecution, Old World prejudices were transplanted in the Colonies, where religious discrimination soon became commonplace.[43]

The Establishment Clause of the First Amendment[44] was intended to curb these abuses of the colonists' religious freedom by preventing majoritarian support for popular religious denominations.[45] From the beginning, the federal government's effort to convert Indians to Christianity became a cornerstone of its federal Indian policy.[46] As one commentator noted:

> The government and the religious societies were intertwined in their efforts to civilize and Christianize the Indians throughout the nineteenth Century. The government supported missionaries

> with funds, assigned agencies to religious societies, and provided land for the building of churches. The question is whether this intermingling constituted an establishment of religion.[47]

As may be expected, government violation of Indian religious freedoms in respect to the Establishment Clause was soon followed by an incursion on these freedoms alternatively protected by the Free Exercise Clause, which prohibits governmental intrusion on the practice of religion. Outright prohibition of tribal religions by the federal government began in the 1890's. Federal troops slaughtered Indian practitioners of the Ghost Dance at Wounded Knee, and systematically suppressed this tribal religion on other Indian Reservations. In 1892 and 1904, federal regulations outlawed the practice of tribal religions entirely, and punished Indian practitioners by either confinement in the agency prisons or by withholding rations.[48]

This ban was not lifted until 1934, more than one generation later. Unfortunately, our government still persisted in infringing upon tribal religious practices. Federal agents arrested Indians for possession of sacred objects such as peyote, eagle feathers, and the cut hair of Indian children. By authority of the federal government, these agents also prohibited schoolchildren from speaking their native languages, prevented native access to holy places located on public lands, destroyed Indian sacred sites, and interfered with tribal ceremonies.[49]

In 1978, Congress sought to reverse this history by creating a resolution establishing a federal policy to preserve and protect Native American religious freedom.[50] The Committees responsible for this measure stated: "America does not need to violate the religions of her native people. There is room for and great value in cultural and religious diversity. We would all be the poorer if these American Indian religions disappeared from the face of the Earth."[51]

However, it requires cooperation from all three branches of government in our system to effectively implement a Congressional policy. Unfortunately, such support was not forthcoming, and the enlightened attitudes expressed in the Act in regard to Indian religious freedom have never been effectuated.[52] The federal courts have since ruled that this policy has no mechanism of enforcement.[53] As a result of recent decisions denying Native Americans religious freedom guaranteed by the First Amendment, it appears that we are regressing to a dark period where once again our government is allowing religious discrimination against our indigenous citizens to go unchecked.

B. The Lyng and Smith Decisions

Alarmingly, the Supreme Court has of late exhibited a growing insensitivity toward Native American religious freedom. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[54] the Court allowed the Forest Service to virtually destroy an ancient Indian sacred site located on federal land. The Court arrived at this abominable decision by construing the Free Exercise Clause in the most narrow way imaginable, holding that this First Amendment guarantee only provides protection against laws which coerce citizens to violate their religion or punishes them for practicing their beliefs.[55]

As a result of *Lyng*, a growing number of irreplaceable tribal sacred sites are no longer under government protection and are currently being destroyed. The desecration of Indian holy places causes great concern by

those citizens interested in the cultural survival of the Indian nations, and distressed at what this loss would mean to our nation's cultural heritage in general. However, the retreat from First Amendment religious protection signified by *Lyng* went largely unnoticed, probably because the worship of the land, including mountain tops and waterfalls, is a practice unique in our country to Native Americans.[56]

It was not until its 1990 decision in *Smith*[57] that the Supreme Court's insensitivity to Native religious rights came to the attention of the general public. In that case, the Court affirmed the decision of an Oregon Employment Appeals Board denying unemployment compensation to two Native Americans who were terminated from their employment as counselors with a substance abuse rehabilitation center because of their participation in a sacramental peyote ceremony.

Peyote, used for centuries by Indians in religious ceremonies, is a cactus plant that grows only along the Rio Grande River, near the Texas and Mexican border. Today, this religion is among the most ancient, largest and most continuously practiced indigenous religions in the Western Hemisphere.[58] As found in *People v. Woody*:[59]

> Peyotism discloses a long history. A reference to the religious use of peyote in Mexico appears in Spanish historical sources as early as 1560. Peyotism spread from Mexico to the United States and Canada: American anthropologists describe it as well established in this country during the latter part of the nineteenth century. Today, Indians of many tribes practice Peyotism.[60]

Peyote is used as a sacrament, but it is considered by Native Americans to be more important in their religion than the use of wine in Christian services. The court in *Woody* stated: "Although peyote serves as a sacramental symbol similar to bread and wine in certain Christian churches, it is more than a sacrament. Peyote constitutes in itself an object of worship; prayers are devoted to it much as prayers are devoted to the Holy Ghost."[61]

Federal law and twenty-eight states have permitted the religious use of peyote by Native Americans for decades through statutory, administrative, or judicially-created religious exemptions from drug laws, and there has been no discernible law enforcement, public safety or health problem created as a result of this policy. Although the state law of Oregon does not allow for such an exemption, the Supreme Court of Oregon determined that the decision to disallow unemployment benefits to two Native American rehabilitation counselors could not withstand federal constitutional scrutiny.[62]

Prior to *Smith*, it was settled constitutional law that a two-part balancing test would be used to determine the validity of a law which incidentally burdened religion. Once parties challenging legislation demonstrated that their belief was sincere and that the state action imposed a substantial burden on their religious practice, the government was required to show that the law was enacted to achieve a compelling state interest by the least restrictive means available.[63] However, in *Smith*, the Court broke with precedent and rejected the traditional balancing test. The protection of the diversity of minority religions in our country was found to be a "luxury"and the extension of First Amendment guarantees to unpopular faiths would be "courting anarchy."[64]

The decision also suggested that the Free Exercise Clause may not protect religious adherents against government intrusion unless some other right guaranteed by the First Amendment was also affected.[65] In a concurring opinion, Justice O'Connor nevertheless strongly criticized the majority opinion for not applying the traditional standard of review in this case.[66] Justice Blackmun wrote a strong dissent, joined by Justices Marshall and Brennan.

For Indians, the decision in *Smith* creates the frightening specter of a return to the era when tribal people could be imprisoned for practicing their religion. In the wake of *Smith*, the State of Oklahoma is currently prosecuting an elderly, life-long member of the Native American Church for possession of peyote. As a result of the decisions in *Smith* and *Lyng*, all of our indigenous inhabitants who wish to worship according to the dictates of their conscience are in danger. As Peterson Zah, President of the Navajo Nation, in a plea for Indian religious liberty recently stated:

> Indians do not have the same religious freedoms as other Americans, even though their ceremonies developed thousands of years before Europeans—many of them fleeing religious persecution—settled in the United States. . . . Respect should be given to a religion that does not involve going to church one day a week, but which is based on animals, the world and the universe, and whose church is the mountains, rivers, clouds and sky . . . .[67]

After Cohen's allegorical "miner's canary" was in effect snuffed out by these decisions, religious organizations and constitutional scholars finally rose up to call to public attention the fact that a cherished constitutional right was in danger of being extinguished. As stated in a recent *Time* cover story:

> For all the rifts among religious and civil-libertarian groups, this decision brought a choir of outrage singing full-voice. A whole clause of the Bill of Rights had been abolished, critics charged, and the whole concept of religious freedom was now imperiled. "On the really small and odd religious groups," said University of Texas' Laycock, "it's just open season."[68]

As federal courts are now constrained to follow *Smith*, we can expect a rash of decisions denying citizens who are not members of mainstream Judeo-Christian religions the protection of the First Amendment.[69] Although the Solarz Bill,[70] proposed for the purpose of restoring the "compelling state interest" balancing test, is intended to redress this situation, it does not deal with concerns unique to the practice of Native American religions. Also, there is no guarantee that the courts will not attempt to weaken this legislation in future Indian religion cases.

IV. CONCLUSION

The treatment of Native American religious freedom and our government's attitudes toward their civil rights as citizens has been a long-standing problem. Today, 500 years after Columbus arrived on this continent, it is intolerable that our original inhabitants are still not treated as the equal of other citizens under the Constitution. At this juncture in history, we are finally becoming aware that the curtailment of freedoms enshrined in the Bill of Rights in respect to certain minority groups may also affect the rights of all citizens.

Because of the failure of the judicial and executive branches of government in this regard, it is now incumbent upon Congress to begin to focus on this serious human rights problem in our country, with a view towards redressing religious discrimination against Native Americans. It is imperative that we guarantee that their freedom of worship is protected. This is mandated not only by the Constitution, but also by the trust relationship between the federal government and the Indian Tribal governments, which has been honored by all three branches of government since the 1830's.

Today, there is a need for our society to rededicate itself to allowing equal protection of the laws for all citizens. With the collapse of communism, historic opportunities exist for us to provide freedom and equality throughout the world. That international challenge cannot be met if America's commitment to liberty for all is not strong. We must take a stand to reject racism, discrimination and prejudice. It is now time for us to accord respect and equality to American Indians, especially in regard to their right to worship in the manner that their ancestors have for centuries before them. If the First Americans cannot be secure in such freedom, the liberty of all Americans stands in danger. *(This article is reprinted with permission from the University of West Los Angeles Law Review, Volume 23, 1992.)*

Senator Daniel K. Inouye, D-Hawaii. Member of U.S. Senate, Jan. 3, 1963-Jan. 3, 1993. Member of U.S. House of Representatives, Aug. 21, 1959-Jan. 3, 1963. Committees: Chairman, Committee on Indian Affairs; Appropriations; Commerce; Science & Transportation; Rules & Administration. A.B., University of Hawaii; J.D., George Washington University. Member of the Hawaii Bar.

1. Employment Div. v. Smith, 110 S. Ct. 1595 (1990).

2. See the findings of Congress in the American Indian Religious Freedom Act of 1978, 92 Stat. 469 (August 11, 1978), codified at 42 U.S.C.A. 1996.

3. In Wisconsin v. Yoder, 406 U.S. 205, 216-17 (1972) the Court found religion to be a pervasive part of life in the Amish society. This principle applies to the American Indian as well.

4. See The Religious Freedom Restoration Act of 1991 (H.R. 2797) sponsored *inter alia* by Representative Stephen J. Solarz.

5. See Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 452-53; Smith, 110 S. Ct. at 1606.

6. Black's Law Dictionary 420 (5th ed. 1979). In The Random House Dictionary Of The English Language (unabr. ed., Random House, New York, 1983), discrimination is defined to mean treatment of a person based on the group, class, or category to which that person . . . belongs rather than on individual merit: *racial and religious intolerance and discrimination.* (emphasis added).

7. Brown v. Board of Education, 347 U.S. 483, 494 (1953).

8. See Plessy v. Fergeson, 163 U.S. 539 (1896) (establishing the "separate but equal" doctrine).

9. See, *e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1885), where a facially neutral ordinance made laundry businesses illegal in San Francisco, with certain exceptions. Though fair and impartial on its face, it was declared unconstitutional, because the ordinance disparately impacted Chinese residents and was administered discriminatorily.

> Though the law be fair on its face and impartial in its appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74.

Discrimination through facially neutral rules is perhaps more invidious than overt discrimination, because it is harder to prove as racially motivated and thus more difficult to ferret out. For example, a rule requiring English only in public schools seems fair and neutral on its face unless it is enforced, as it was in Lau v. Nichols, 414 U.S. 563 (1974) in a school attended predominantly by Chinese speaking students.

10. Felix Cohen, Handbook Of Federal Indian Law (The Michie Co., 1982 ed.).

11. *Lyng*, 485 U.S. at 439.

12. *Smith*, 110 S. Ct. at 1595.

13. The Fourteenth Amendment provides in pertinent part, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its Jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

14. The Fifth Amendment provides in pertinent part, "nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

15. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). See also, Joseph Tussman and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 Cal. L. Rev. 341, 344 (1949).

16. *Plessy*, 163 U.S. at 538.

17. *Id.* at 551.

18. *Brown*, 347 U.S. at 483.

19. *Id.* at 494.

20. *Id.* at 494-95.

21. Mirabayashi v. United States, 320 U.S. 81 (1943).

22. Korematsu v. United States, 323 U.S. 214 (1944).

23. Japanese Reparations Act, 50 U.S.C 1989 (1988). Many question the equity of this remedial act.

24. Gerald Gunther, *The Supreme Court 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

25. Chicago Police Dept. v. Moseley, 408 U.S. 91 (1972).

26. McGowan v. Maryland, 366 U.S. 425, 426 (1961).

27. This standard of review was applied in Shelly v. Kramer, 334 U.S. 1 (1948) where enforcement of a racially restrictive covenant by state court, pursuant to the state's policy for enforcing such agreements, constituted state action for the purpose of the Fourteenth Amendment.

28. *See, eg., Korematsu*, 323 U.S. at 216 (classifications involving race); Hernandez v. Texas, 347 U.S. 475 (1954) (classifications involving national origin); Sugarman v. Dougall, 413 U.S. 624 (1973) (classifications involving alienage).

29. *See* United States v. Carolene Product Co., 304 U.S. 144 (1938). Justice Stone stated that courts must protect certain "discrete and insular minorities," who are made victims of prejudicial attitudes and so are denied access to the "political processes ordinarily to be relied upon to protect minorities." *Id.* at 152 n.4. The Justice explained that legislation enacted that affects this type of minority group must be "subjected to more exacting judicial scrutiny under the general prohibition of the 14th Amendment than are most other types of legislation." *Id.*

30. San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973) (one of the criteria to qualify as a suspect class is that the particular class be "subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"). *Id.*

31. *See* Trimble v. Gordon, 430 U.S. 762 (1977); Craig v. Boren, 429 U.S. 190 (1976).

32. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971) (gender); Trimble, 430 U.S. at 762 (illegitimacy); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (illegitimacy); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy).

33. *Yick Wo*, 63 U.S. at 356 (equal protection guarantees contained in the Fourteenth Amendment to the Constitution extend to all persons within the territorial jurisdiction of the United States "without regard to any differences of race, or color, or of nationality.") *Id.* at 369.

34. Wong Wing v. United States, 163 U.S. 223 (1896) ("[A]ll persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless of a presentment to a grand jury, nor be deprived of life, liberty or property without due process of law.") *Id.* at 238.

35. Plyler v. Doe, 457 U.S. 202, 210-12 (1982).

36. Ralph W. Johnson and E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 588 (1979). The Indian Civil Rights Act is codified at 25 U.S.C. 1301-1341 (1976).

37. Rennard Strickland, *Indian Law and Policy: The Historian's Viewpoint*, 54 WASH. L. REV. 475 (1979).

38. *Id.* at 594 (noting early cases such as Montoya v. United States, 180 U.S. 261 (1901) and United States v. Rogers, 45 U.S. (4 How.) 572 (1846)). The author notes that these cases referred to Indians as a "race," although more contemporary cases do not. The contemporary concept of the race of Indians includes Indians from the Caribbean, Latin America and Canada, none of whom enjoy a special status under United States law. In addition, there are United States citizens who, although racially Indian, do not share the special status. Reasons for that lack of status include: (1) the tribe is one with which the United States has never assumed a trust relationship; (2) the tribe has been terminated by Congress, *see, e.g.*, 25 U.S.C. § 564 (1976); and (3) the individual has severed his or her tribal ties, see Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891). *Id.*

39. Johnson and Crystal, *supra* note 36, at 607. The authors state that this standard of review is "somewhat" greater than the mere rationality level of review, although it seems to be closer to that test than to strict scrutiny. *Id.*

40. Strickland, *supra* note 37, at 478.

41. K. Sale, The Conquest Of Paradise, 96-97 (1990).

42. P. Nabakov, Native American Testimony: An Anthology Of Indian And White Relations, 60 (1978).

43. *See* Everson v. Board of Education, 330 U.S. 1, 8-12 (1946).

44. The First Amendment provides: *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;* or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for the redress of grievances." (emphasis added). U.S. Const. amend. 1.

45. Laurence H. Tribe, American Constitutional Law, § 14-3 at 1158-61 (2d ed. 1988).

46. *See, e.g.*, Quick Bear v. Leupp, 210 U.S. 50 (1908) (government's use of federal funds to establish a Catholic church on the Rosebud Indian Reservation did not violate the Establishment Clause).

47. The American Indian Religious Freedom Act Report, Federal Agencies Task Force, Secretary of the Interior (Department of the Interior, August, 1979) at 3-6. This report recounts the history of government treatment of Indian religions and was part of a study mandated by Section 2 of the American Indian Religious Freedom Act (AIRFA), Pub. L. No. 95-34 1, Section 1, 92 Stat. 469 (1978). *See also, Martin, Constitutional Rights and Indian Rites: An Uneasy Balance*, in 3 Western Legal History 245, 246-252.

48. American Indian Religious Freedom Act Report, *supra* note 47, at 22; Regulations of the Indian Office, effective April 1, 1904, Secretary of the Interior (Washington: Government Printing Office, 1904) at 102-3.

49. *See*, Articles by Vine Deloria, Jr. and Walter Echo-Hawk in Special Edition On Religious Freedom: Today's Challenge, Vol. 16, Native American Rights Fund Legal Review, (No.2, Summer 1991).

50. AIRFA, *supra* note 47.

51. H.R. Rep. No. 1308, 95th Cong., 2d. Sess. 3 (1978); S. Rep. No. 709, 95th Cong., 2d. Sess. 3 (1978).

52. *See generally*, S. Moore, *Sacred Sites and Public Lands*, in Handbook Of American Indian Religious Freedom 81-89 (Christopher Vescey ed., 1991).

53. *See, e.g.*, Wilson v. Block, 708 F. 2d 735, 745-47 (D.C. Cir. 1983). "Thus AIRFA requires federal agencies to consider, but not necessarily to defer to Indian religious values. It does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices." *Id.* at 747.

54. *Lyng*, 485 U.S. at 439.

55. *Id.* at 547.

56. For an explanation of the role of sacred sites in American Indian tribal religions, *see* Vine Deloria, Jr. *Sacred Lands and Religious Freedom*, Vol. 16 Native American Rights Fund Legal Review, 1, 1-6 (No.2, Summer 1991).

57. *Smith*, 110 S. Ct. at 1595.

58. Omer C. Stewart, Peyote Religion: A History (Univ. of Okla. Press, 1987).

59. People v. Woody, 394 P. 2d 813, 817 (1964).

60. *Id.*

61. *Id.*

62. Black v. Employment Div., 301 Or. 221, 721 P.2d 451 (1986); Smith v. Employment Div., 301 Or. 209, 721 P. 2d 445 (1986).

63. Ronald D. Rotunda, Et Al., Treatise On Constitutional Law, Substance And Procedure, § 21.8 at 401-402 (1986). See Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Board, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398, 402-403 (1963).

64. *Smith*, 110 S. Ct. at 1605.

65. *Id.* at 1601.

66. *Id.* at 1610-11.

67. ALBUQUERQUE JOURNAL, Nov. 23, 1991, at 1.

68. TIME, Dec. 9, 1991, at 68.

69. *See*, Hunafa v. Murphy, 907 F.2d 46, 48 (7th Cir. 1990); International Center for Justice and Peace v. I.N.S., 910 F. 2d 42 (2d Cir. 1990); Salvation Army v. NJ. Dept. of Community Affairs, 919 F.2d 183, 194-95 (3rd Cir. 1990); Salam v. Lockhart, 905 F.2d 1 168, 1171 n.1 (8th Cir. 1990); South Ridge Baptist Church v. Indus. Comm'n of Ohio, 911 F.2d 1203, 1213 (6th Cir. 1990); Cornerstone Bible Church v. City of Hastings, Mich., 740 F. Supp 654, 669-70 (D. Mich. 1990); Montgomery v. County of Clinton, 743 F. Supp. 1253, 1259 (W.D. Mich., 1990); Yang v. Sturner, 750 F. Supp. 558, 559 (D. R.I. 1990).

70. Solarz, *supra* note 4.

SACRED GROUND

eagles disappear into the sun
surrounded by light from the face of Creation
then scream their way home
with burning messages of mystery and power

some are given to snake doctors and ants and turtles and salmon
to heal the world
with order and patience

some are given to cardinals and butterflies and yellow medicine flowers
to heal the world
with joy

some are given to bears and buffalo and human peoples
to heal the world
with courage and prayer

messages for holy places
in the heart of Mother Earth
deep inside the Old Stone Woman
whose wrinkles are canyons
in the roaring waters and clear blue streams
and bottomless lakes
who take what they need
in the forests of grandfather cedars
and mountains of grandmother sentinel rocks
who counsel 'til dawn

messages for holy places
where snow thunder warns
and summer winds whisper
this is Sacred Ground

Sacred Ground at Spirit Falls
where the small round stones have secrets
that clear-cutters can never discover

Sacred Ground at Mount Graham
where Apaches pray for a peaceful world
invisible through the vatican telescope

Sacred Ground at Bear Butte
where Cheyennes and Lakotas hide from tourists
to dress the trees in ermine tails and red-tail hawk feathers
and ribbons of prayers to the life-givers

Sacred Ground at the San Francisco Peaks
where Navajos and Hopis dodge ski-bums and bottles
to settle the spirits
where they walk

Sacred Ground at Badger Two Medicine and Red Butte and Crazy Mountain
where miners have drills for arms
and gold in their eyes

Sacred Ground at Chota
where even Tellico's dam engineers hear Tsalagee voices
through the burial waters

Sacred Ground at the Medicine Wheel
and all the doors to the passages of time
to Sacred Ground of other worlds
where suns light the way
for eagles to carry messages
for fires on
Sacred Ground

by: suzan shown harjo

THE REPRESSION OF INDIAN RELIGIOUS FREEDOM

by Patricia Nelson Limerick, Ph.D

In the 1890's, Captain A. E. Woodson brought remarkable energy to his job as an Indian agent. When he arrived at the Cheyenne and Arapaho reservation in Oklahoma he found the Indians "indulging in the grass dance and enjoying the medicine feasts without molestation." Accordingly, his "first act was to forbid dances and feasts . . ." Once begun, Woodson launched himself wholeheartedly into the business of forbidding. He undertook to prohibit the practices of medicine men or shamans, the custom of sharing goods with relatives, traditional forms of marriage, and visits to other reservations. When the Cheyenne and Arapaho people resisted his interference in their lives, their defiance only convinced Woodson that he was in the right. "An agent must sacrifice any desire to be popular," Woodson wrote, "if he be inspired to do his whole duty."[1]

Captain Woodson's enthusiasm for the exercise of power, his reports to the Commissioner of Indian Affairs show, was unending and unquenchable. When the Cheyenne and Arapaho people resisted his orders and hired another white man to pursue his removal, Woodson wrote to the Department of the Interior, explaining his struggle with his charges. The Indians, he said, showed "a rebellious spirit in opposition to the methods which have been inaugurated with the sanction and approval of your office . . ." This resistance had gone as far as "an open expression of disapproval of my regime, which is distasteful to the old men who are wedded to barbarous customs . . ." Woodson had simply "endeavored to institute newer, and in my opinion, better methods tending to the improvement of the condition of these people . . ." The Department's response was, for Woodson, very gratifying. The Indians had to be restrained "from the indulgence in any practices which tend to continue them in barbarism. . . ." Woodson's "efforts have met with the full sympathy and approval of this office." Indeed, Woodson was

empowered to "inform these Indians that your efforts to control them in a more civilized method of life meets the approval of this office . . . ."[2]

"Let [the Indians] know that the power of Government is behind you," the officials in Washington told their agent in Oklahoma.[3] Those words make it impossible to dismiss Captain Woodson as a peculiar, eccentric, or anomalous individual. He was, instead, a delegated agent of his nation, attacking religious freedom on government orders.

The contradictions between American ideals and American practices form a familiar theme in our national history. Everyone knows that many of the founders of the American nation, who demanded their natural right of freedom and who complained about their "enslavement" to the British king, were themselves slaveowners. Everyone knows that much of national history, from the Thirteenth Amendment ending slavery down to the Civil Rights Acts of our time, has been driven by a campaign to bring ideals and practices into a closer harmony. But the national contradiction represented by Captain A. E. Woodson has received much less in the way of public attention or efforts to provide a remedy. A nation, dedicated to freedom and committed to the separation of church and state, imposed on Indian people a formal policy of the prohibition of Native religions and forced Christianization. Adopted in 1791, the First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." For most of the two centuries of this country's history, the First Amendment has been held suspended, waiting for a full and active application to the religious rights of Indian people.

From the origins of the British Empire in North America, colonists assumed that civilization and Christianity were inseparable parts of the same package. As the distinguished historian of Indian policy, Francis Paul Prucha, has noted, while English civilization and the Christian religion "could be separated in theory, in practice they were nearly always combined." One English writer put the case in a nutshell: "We give the savages what they most need. Civilitie for their bodies. Christianitie for their soules." The founding of the United States left this premise virtually unchanged. As Father Prucha sums it up, "It was the goal of the United States to civilize, Christianize, and educate the Indians so that they could ultimately be absorbed into the mainstream of American society." Accordingly, the United States "set about to change the fundamental cultural patterns of the Indians in a self-righteous paternal manner."[4]

As waves of Christian religious enthusiasm swept the United States in the nineteenth century, a missionary movement gained both influence and eager workers. As Protestant church groups worried about the souls of heathens in Africa, Asia, Hawaii, and North America, the federal government fully welcomed the missionaries as partners in Indian policy. In Prucha's words, "The United States government accepted as allies in its work of civilization the Christian churches of the land," with "the two processes, civilizing and Christianizing, . . . inextricably mixed." Federal funds for Indian education provided partial support for missionary schools; the government, for instance, sometimes constructed the schoolhouses that Christian missionaries would teach in. For government officials as much as for missionaries, Christianity was so manifestly the right religion—indeed, the only religion with a claim on truth—that the question of religious liberty for Indians never entered their minds. To nineteenth century white Americans, the First Amendment protected the exercise of *religion,* while what the Indians practiced was superstition, primitive rites, and peculiar customs—practices that, to the nineteenth century Anglo American mind, did not deserve the First Amendment's guarantees of liberty.[5]

Over the course of the nineteenth century, the partnership between church and state became more pronounced and more official. The terms of President Ulysses S. Grant's Peace Policy hinged on "the conscious intent of the government to

turn to religious groups and religious-minded men for the formulation and administration of Indian policy." And, "building on the long history of close relations between the federal government and the missionary groups in Indian matters," Father Prucha writes, "the nation now went far beyond simple cooperation of church and state in educational matters. It welcomed official church societies and church-related individuals into fuller partnership; and to a large extent these groups came to dominate official government policy and administration of Indian affairs. . . ."[6]

As these "government functions were handed over to the churches," did anyone raise the questions of religious freedom and of the separation of church and state that seem so obvious to us today? Indeed, as Father Prucha notes, "[m]uch was made of the question of religious liberty," but not at all in the terms we might expect. The question was entirely one of religious liberty *between and among Christian churches.* "By religious freedom," the Christians "meant liberty of action on the reservations for their own missionary activities . . ." and they "made no move to grant as much as a hearing to the Indian religions.'"

In the early 1880s, Secretary of Interior Henry Teller further tightened the already very narrow meaning of religious freedom. In December of 1882, Teller wrote the Commissioner of Indian Affairs, to "call your attention to what I regard as a great hinderance to the civilization of the Indians, viz., the

continuance of the old heathenish dances . . ." If, Teller said, the Indians "are not willing to discontinue them, the agents should be instructed to compel such discontinuance." Teller found, as well, in the "influence of the medicine men," a second "great hindrance to the civilization of the Indians." The medicine men used "their conjurers' arts to prevent the people from abandoning their heathenish rites and customs." "Steps should be taken," the Secretary of the Interior said, "to compel these impostors to abandon this deception and discontinue their practices," practices that were "without benefit" and "positively injurious." Similarly, Teller lamented the irregularity of traditional marriage customs, and the Indian's "very general custom of destroying or distributing his property on the death of a member of his family." Here, too, the government should "formulate certain rules that shall restrict and ultimately abolish these practices."[8]

"If it is the purpose of the Government to civilize the Indians," Teller argued, "they must be compelled to desist from the savage and barbarous practices that are calculated to continue them in savagery." To put an end to the "pernicious influence of these heathenish practices," Teller created a system of Courts of Indian Offenses. Agents would assemble "tribunals" of three Indian judges, who would, in much of their activities, investigate, convict, and punish offenders who persisted in following their Native religions. Created by an executive action from the Department of the Interior, these courts were of doubtful legality. They did not derive their authority from a constitutional provision, nor from an act of Congress. Instead, the authority behind them rested on a widespread Anglo American belief that Christianity was the only true religion, and Indian religions were simply variations on superstition and barbarism.[9]

When codified, the "requirements" that the Courts of Indian offenses were charged with enforcing made religious practices a central target. "The 'sun-dance' and all other similar dances and so-called religious ceremonies," read one requirement, "shall be considered 'Indian offenses.' " "[A]ny Indian found guilty of being a participant" would, on a first offense, be "punished" by the "withholding of his rations for not more than ten days." For a repeated offense, the penalty would be the withholding of "rations for fifteen to thirty days, or incarceration in an agency prison for a period not exceeding thirty days." The range of punishable offenses included "any plural marriage hereafter contracted"; the destruction of property in mourning for a lost relative; "the practice of bands of Indians making or returning visits to other Indians"; and "the usual practice of so-called 'medicine men.' " If a medicine man "resort[ed] to any artifice or device to keep the Indians under his influence," "adopt[ed] any means to prevent the attendance of children at the agency schools," or use[d] any of the arts of a conjurer to prevent the Indians from abandoning their heathenish rites and customs," he was to be "confined in the agency guardhouse until such time as he shall produce evidence satisfactory to the court, and approved by the agent, that he will forever abandon all practices styled Indian offenses under this rule."[10]

To get out of prison, by requirement of the United States government, an Indian religious leader had to renounce his faith and declare his intention to stop practicing its rituals. Every religious leader did not, of course, suffer this fate. Federal agents on reservations varied considerably in the vigor with which they followed their orders, and Indian people developed effective strategies of offering an appearance of submission, while maintaining their customs in secret. Even if it was unevenly enforced, the suppression of Indian religious liberty stood as formal, official United States policy. In the nation's long-running campaign to bring its practices into harmony with its ideals, this story demands the attention of the American public and its elected leaders.

"I am satisfied," wrote D. C. Govan from the Tulalip Agency in Washington, "that the greatest obstacle to progress and to the advancement of the young Indians is the old Indian. He still clings to his old superstitions and cherishes secretly the old traditions and teachings of his savage ancestors." It was "cruelty," thought W. N. Hailmann, Superintendent of Indian Schools, to hand the Indian young over to "the savagery of the old Indians." The federal government had to act "to protect the young Indian against the old."[11]

The campaign against Indian religions was, at its core, a campaign against the Indian family. Ties holding parents to children, grandparents to grandchildren, uncles and aunts to nephews and nieces, elders to juniors, knit tribal societies together. In those terms, it is hard to imagine a better way of shaking, eroding, and fragmenting identity and morale than the agents' campaign to discredit Indian elders. How, one wonders, did the officials think that they could put a society back together again, after the federal government had—purposefully, consciously, intentionally—torn the generations apart? Federal officials held to a remarkable faith that one could remodel a society with the precision of a surgical operation, cutting off the influence of the older generation and leaving the younger generation not only intact, but capable of achieving a coherent, balanced life with a suddenly changed economy, religion, and family structure.

The campaign against family ties went beyond the effort to pit older people and younger people against each other. Many tribal people felt obligated, often by tenets of their

religions, to share their material possessions with relatives. This generosity drove the federal officials to distraction. "Another vice," said Captain John G. Bourke, "is their care for their relations. They are entirely too fond of their relations. They will do anything for them if they are poor." "We must smother (the Indian's) inherited propensity for hospitality," proclaimed Agent A. E. Woodson.[12]

"The most common and pernicious custom" among the Indians, Woodson said, "is the habit of visiting their relatives and friends and eating their substance. All food supplies are common property." Why not tolerate, even celebrate, this generosity? Agent Woodson supplied the answer, with his characteristic directness: "Their lavish hospitality militates against the accumulation of wealth by individuals."[13]

Woodson's remark calls our attention to the economic component of the federal officials' objections to Indian religions: Native customs of sharing, of hospitality, of feasting, or of sacrifice of property in mourning ceremonies, interfered with the accumulation of property and the pursuit of profit. While the agents' assumption that Christianity was the only legitimate faith was clearly a religious prejudice, it was a prejudice solidly reinforced by practical, economic considerations. One sees this factor clearly at work in the disapproval of dancing. Because of dancing, Joseph Clements wrote, the Santee Indians "neglect their work. . . ." Because of the dances at the Crow Creek Reservation, Agent Fred Treon said, the Indians had "but little time to attend their stock and farms."[14]

For these nineteenth century Anglo-Americans, forcing the Indians to adopt the habits of materialistic, profit-minded white American society was as essential a task as forcing them to adopt the habits of Christianity; indeed, the two sets of habits appeared to the federal officials as mutually interdependent and equally necessary. The enterprise of demanding devotion to a new work ethic and the enterprise of demanding devotion to a new deity were inextricably intertwined.

"Christianity," declared I. J. Wootten in 1895, "is the calcium light of civilization, quickens the love of justice and morality, and is, above all, the most powerful agent that can be used to obliterate the practice of the degrading and superstitious rites of the medicine man held in reverence by all Indians." Wootten was not, of course, a missionary himself; he was a prime example of a federal employee acting as an official advocate of one religion's right to subordinate another. In his hostility toward the practices of medicine men or shamans, Wootten was typical of the agents of his time. The practice of traditional healing ceremonies was, in other words, transformed into a crime; as George B. McLaughlin, agent at the Blackfeet Reservation in Browning, Montana, reported, "I have already begun punishing 'doctors' for these offenses, and hope in time to break up their barbarous custom."[15]

The attack on the medicine men undertook to loosen the tight connections between religious practice and physical health, between spiritual life and material life. It was, as well, part of the attack on the authority of elders in tribal societies. The defeat of old religious practices, the agents recognized without regret, would require breaking the power of the leaders of Indian societies.

These struggles of power rested, finally, on physical force. By the 1890s, the wars of conquest were officially over; but the power politics of conquest remained unsettled. The actual battles were, in many ways, only a prelude to this campaign on the part of the agents to convince the Indians that, in Lt. V.E. Stottler's words, agent for the Mescalero Apache, "the Government is supreme, and will do what it pleases with them or theirs." Perhaps the Pine Ridge Agency in South Dakota showed this condition of conquest-in-progress most clearly. The Pine Ridge Reservation had been a center of the Ghost Dance, the religious movement that promised a return of good times and a retreat of white conquest. Panic and alarm on the part of agents facing this movement had triggered the events that led to the killing at Wounded Knee in December of 1890.[16]

In this context, the suppression of religious freedom carried down-to-earth meanings of power and dominance. To the agents of the 1890s, religion could rebuild a conquered people's morale; religion could make them defiant; religion could make them hard to rule. In those terms, suppressing religion was as vital a part of conquest as sending troops out to engage in direct military combat.

But Indians possessed a great constant. Persistent enthusiasm for their own religions marked all of their dealings with the official representatives of the American nation. And yet it was the Anglo-American custom to reserve the word "religion" for "Christianity," and to assign the words like "superstition" or "barbaric customs" to Indian faiths. "Gross superstitions of the worst kind are rampant," Rev. A. B. Shelly told the Board of Indian Commissioners in 1895, describing the religion of the Hopi Indians. The Omaha, their agent Wm. H. Beck reported, "claim that they have a right to their religious observances, which are in fact the barbaric customs of their progenitors." These habits of language, of course, connect to important and down-to-earth consequences; the First Amendment, after all, guarantees protection of religion not for "barbaric customs," "superstitions" or "heathenish practices."[17]

In the century since the 1890s, that policy has softened, and in some ways, reversed itself. The American Indian Religious Freedom Act of 1978 declared a national regret over a history of direct, blatant repression of Indian freedom. And yet, by the terms of the 1988 Supreme Court's decision in the *Lyng* case, the 1978 act has been reduced to a minor requirement that federal land management agencies, planning a disruption of a site sacred to Indian religions, must consult with Indian people. After having consulted, the agencies are free to discount the priority of the Indian claim.

Despite repeated, public declarations of regret over the patterns of the past, one might argue that the change consists of an increased subtlety in the pressures put on Indian religious practice. In the 1890s, Captain A. E. Woodson was, at the least, direct and unambiguous in his determination to crush Indian religions. In the 1990s, people like Captain Woodson are comparatively rare creatures. But another, more subtle form of opposition to native religions has entered the picture, as federal agents who are simply intent on other goals entirely—resource development on public lands, for instance—rank Indian religious practices second to mainstream American social or economic goals. Instead of Captain Woodson's characteristic bluntness, the 1990s version of opposition to Indian religious freedom can speak a much more subtle language. Instead of the direct orders of Captain Woodson, the challenge to Indian religions today can come in the form of a long, detailed report from a federal land management agency, advocating development of a particular site, and treating an Indian religious ceremony, centered on that site, as a quaint, colorful but dismissable relic of a lost time. Undramatic and indirect as this bureaucratic behavior may seem, its effect on religious practices can be nearly as destructive as the direct attacks of the late nineteenth century.

While public attention has focused on the Indian wars, actual military engagements were only a small part of the process of conquest. Less "colorful" and seemingly less dramatic than the fighting at the Washita or Little Big Horn, the agents' fight for control on reservations—control of Indian people's economic, political, social, family, and religious lives—was just as crucial a part of the story as were the battles waged by the Army. The refusal to recognize the right to the free exercise of religious belief and practice was an essential component in the conquest of native people.

A denial of Indian religious liberty is an undeniable part of our inheritance from the nineteenth century. But this inheritance is not a matter of fate, forced upon us against our will. Some of the injuries of the past are irreversible, beyond repair or redemption. But on this question, there are meaningful choices still to be made. We can continue the patterns of injustice that have their roots in the conditions of conquest. Or we can, in the most concrete way, profit from the lessons of history and break from the track of past injustice. "Let [the Indians] know that the power of Government is behind you," the officials in Washington told Captain Woodson when he launched his campaign to prohibit their religion. A century later, one can imagine a different message from Washington, a message more in harmony with American ideals. Let the Indians know, the new message would read, that the power of Government now stands behind them, and behind their right to religious freedom.

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1. Captain A. E. Woodson, *Report of the Commissioner of Indian Affairs 1895*, p. 229, and *Commissioner 1898*, p. 234.
2. *Report of the Commissioner of Indian Affairs 1896*, pp. 250-251.
3. Ibid., p. 251.
4. Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln: University of Nebraska Press, 1984), pp. 9, 30-31, 33.
5. I quote Prucha's insightful passage at greater length: "When missionaries went among the Indians, they went to educate and to convert, and it would be difficult to tell where one activity ended and the other began. Nor did it matter to the government, which came to depend upon the church societies for civilizing work among the Indians without intending to promote any particular religion. . . . It was quietly understood, by government officials as well as by church leaders, that the American civilization offered to the Indians was *Christian* civilization, and that Christianity was a component of civilization and could not and should not be separated from it . . . The missionary's goal . . . differed little from the goal of Washington, Jefferson, and other public statesmen." Ibid., pp. 145-146.
6. Ibid., p. 482.
7. Ibid., pp. 482, 524-525.
8. Henry Teller, Report of November 1, 1883, in *House Executive Document* No. 1, part 5, vol. 1, 48 Congress, 1 session, serial 2190, pp. xx-xxii.
9. Ibid. pp. xx-xxii.
10. Regulations of the Indian Office, 1904.
11. Beck, *Commissioner 1894*, pp. 189-190; Campbell, *Commissioner 1895*, p. 201; Govan, *Commissioner 1895*, p. 319; Hailmann, *Commissioner 1895*, p. 343 and *Board 1895*, p. 31.
12. Bourke, *Board 1894*, p. 128; Woodson, *Commissioner 1897*, p.225.
13. Woodson, *Commissioner 1895*, p. 143.
14. Clements, *Commissioner 1894*, p. 192; Treon, *Commissioner 1894*, p. 276; Woodson, *Commissioner 1895*, p. 243; Beck, *Commissioner 1896*, p. 198.
15. Wootten, Nevada Agency, *Commissioner 1895*, p: 211; Bourke, *Board 1894*, p. 129; Williams, Navajo Agency, *Commissioner 1895*, p. 119; Brentano, *Commissioner 1895*, p. 267-268; McLaughlin, *Commissioner 1897*, p. 163. The "ringleaders" among the Hopi that Williams described were arrested and sent into "confinement" at Alcatraz Island.
16. Penney, *Commissioner 1894*, p. 289.
17. *Commissioner 1896*, p. 241; Shelly, *Board 1895*, p. 90; Beck, *Commissioner 1896*, p. 198.

NATIVE AMERICAN FREE EXERCISE OF RELIGION ACT OF 1993 S. 1021: BACKGROUND AND CALL TO ACTION

WHAT IS THE STATUS OF S. 1021? On May 25, 1993, Senator Daniel Inouye, Chairman of the Senate Committee on Indian Affairs, introduced the Native American Free Exercise of Religion Act of 1993 (S. 1021). Original co-sponsors are: Senators Max Baucus (D-MT), Ben Nighthorse Campbell (D-CO), Russell Feingold (D-WI), Tom Harkin (D-IA), Mark Hatfield (R-OR), Claiborne Pell (D-RI), and Paul Wellstone (D-MN).

A hearing on S. 1021 by Senator Inouye's Committee is expected to occur on June 24, 1993, which will initiate a long legislative process throughout the 103rd Congress.

WHAT WILL S. 1021 DO? S. 1021 does *five* things to put clear, legally enforceable "teeth" into Congress' Native American religious freedom policy: 1) protects Native American sacred sites; 2) protects religious use of peyote by Indians in Native American Church services; 3) protects religious rights of Native prisoners to the same extent as prisoners of other religious faiths; 4) streamlines the existing federal permit system for Indian religious use of eagle feathers and assesses recommended allocation of other surplus plant and animal parts in possession of the federal government for Native American religious use; and 5) restores the "compelling state interest test" (discarded by the Supreme Court in Smith) as the legal standard for protecting Native religious freedom in all other instances not otherwise specified.

WHO DOES S. 1021 PROTECT? S. 1021 protects religious rights of: 1) members of Indian tribes; 2) Alaska Natives; and 3) Native Hawaiians.

WHO CAN ENFORCE THE BILL? A private civil cause of action for injunctive relief to enforce the provisions of the bill is given to an "aggrieved party," which is defined as any Native American practitioner, Native American traditional leader, Indian tribe, or Native Hawaiian organization as defined by the Act. Criminal sanctions are provided for damage to sacred sites and for violating the bill's confidentiality provisions.

HOW DOES THE BILL PROTECT SACRED SITES? Procedural and substantive protection are given for any "federal undertaking" that may affect a Native American sacred site. The procedural requirements are similar to existing federal cultural resource and environmental protection laws. Procedurally, *notice* must be given by the agency involved to relevant Indian tribes, Native Hawaiian organizations and Native American traditional leaders that the undertaking may impact the site; and *consultation* is required and a written impact statement prepared analyzing impacts on the site. Substantively, legal standards (enforceable as a private cause of action) would protect sacred sites under a two-tiered balancing test derived from the "compelling state interest" test. Special provisions are included to meet unique Native Hawaiian needs and the needs of Indian Tribes with religions that prohibit disclosure of sacred information. S. 1021 is not directed at Indian tribes, which can regulate protection of sites under their jurisdiction. Thus, activities of Indian tribes are not defined as "federal undertakings," and tribal authority to protect sacred sites located on Indian lands is confirmed.

HOW DOES THE BILL PROTECT RELIGIOUS USE OF PEYOTE BY INDIANS? An existing DEA regulation (21 CFR 1307.31) exempts religious use of peyote by Native Americans from the Controlled Substances Act. The bill would essentially codify this regulation and make it uniform in all 50 states by declaring the use, possession and transportation of peyote by Indians for ceremonial purposes lawful, and that such use not be prohibited by federal or state governments. Further, no Indian shall be discriminated against on the basis of such use. The existing DEA regulatory system and authority will continue undisturbed.

HOW DOES THE BILL PROTECT RELIGIOUS RIGHTS OF NATIVE AMERICAN PRISONERS? Native prisoners shall have, on a regular basis comparable to that afforded to prisoners who practice Judeo-Christian religions, access to: 1) Native American traditional religious leaders, 2) sacred objects; 3) religious facilities. (Access to peyote is excluded from this section.) Further, traditional hairstyles are allowed under pre-*Smith* legal standards of cases such as *Teterud v. Burns*. A commission is established to investigate the status of religious rights of Native prisoners in American prisons.

HOW DOES THE BILL PROTECT RELIGIOUS USE OF EAGLE FEATHERS AND OTHER ANIMAL PARTS? Existing federal law (16 USC 668a) allows Indian religious use of eagle feathers under a U.S. Fish and Wildlife Service permit system. The bill requires USFWS, within one year, to streamline the permit system in consultation with Indian tribes and Native American traditional leaders. Where dead eagles are found on tribal lands, the tribe may regulate the disposition of parts for religious purposes under a tribal permit system. Finally, within one year a plan will be developed to dispose of other surplus animal or plant parts by federal agencies.

WHAT DOES THE PRIVATE CAUSE OF ACTION DO? It allows aggrieved parties to: 1) enforce provisions of the bill; and 2) all other

traditional religious beliefs and practices *not* specifically mentioned elsewhere in the bill are protected under First Amendment legal standards in effect prior to the 1990 *Smith* case, when an aggrieved party satisfies the balancing test and the government fails to sustain its burden of proof.

WHO SUPPORTS FEDERAL LEGISLATION TO PROTECT NATIVE AMERICAN RELIGIOUS FREEDOM? Members of the large, historic Coalition to develop and support appropriate Native American religious freedom legislation are listed elsewhere in this publication. The Coalition played a key role in developing S. 1021 and is working closely with congressional members and staff as Congress considers the bill.

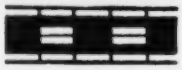
WHAT CAN I DO TO HELP? 1) If they are not already co-sponsors (listed above), write a letter to your Senators asking them to co-sponsor S. 1021. 2) Write a letter to each member of the Senate Indian Affairs Committee asking them to support and advance S. 1021: Dennis DeConcini (D-AZ), Thomas Daschle (D-SD), Kent Conrad (D- ND), Harry Reid (D-NV), Paul Simon (D-ILL), Dan Akaka (D-HAW), Paul Wellstone (D- MN), Ben Nighthorse Campbell (D-CO), Byron Dorgan (D-ND), John McCain (R-AZ), Frank Murkowski (R-AK), Thad Cochran (R-MS), Slade Gorton (R-WA), Pete Domenici (R-NM), Nancy Kassebaum (R-KS), Don Nickles (R-OK). Letters should be addressed to: The Honorable _____, United States Senate, Washington, D.C. 20510.

TO LEARN MORE ABOUT THE LEGISLATIVE EFFORT: Contact: 1) NARF Staff Attorneys: Robert Peregoy (202/785-4166) or Walter Echo-Hawk (303/447-8760); 2) Executive Director, National Congress of American Indians (202/546-9404); 3) Jack Trope, counsel for Association on American Indian Affairs (908/253-9191); or 4) Patricia Locke, Coalition Coordinator (202/546-9404).

Kifaru Productions has produced 3 new video programs concerning the amendments to the American Indian Religious Freedom Act: The Peyote Road; Understanding A.I.R.F.A.; and, Traditional Use of Peyote. For more information call Kifaru Productions at (415) 381-6560.

by: Archie Blackowl
University of Oklahoma Collections

AMERICAN INDIAN RELIGIOUS FREEDOM COALITION FOR THE AMENDMENTS TO THE AMERICAN INDIAN RELIGIOUS FREEDOM ACT*



MEMBERS

American Anthropological Association
American Baptist Churches, U.S.A.
American Civil Liberties Union
American Ethical Union, Washington Ethical Action Office
American Friends Service Committee
American Indian Anti-Defamation Council
American Indian Law Center
American Indian Science & Engineering Society
American Indian Ritual Object Repatriation Foundation
American Jewish Committee
Americans for Indian Opportunity
Apache Survival Coalition
Association on American Indian Affairs
Coalition for Indian Education
Colorado Council of Churches
Confederated Salish and Kootenai Tribes, Flathead Reservation, Montana
Congressional Human Rights Foundation
Conservation International
Coquille Indian Tribe
Council for American Indian Ministry, United Church of Christ
Council of Native American Ministry, National Council of Churches
Crow Indian Peyote Ceremonies (CIPC)
Crow Tribal Council
Cultural Conservancy
Cultural Survival
Eco-Action
ECO, Earth Communications Office
Episcopal Council of Indian Ministries
Flathead Reservation Human Rights Coalition
Friends Committee on National Legislation
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Greenpeace
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National Congress of American Indians
National Indian Education Association
National Parks and Conservation Association
Native American Church, Half-Moon Fireplace, State of Wisconsin, Inc.
Native American Church of Navajoland
Native American Church of North America
Native American Church of Oklahoma
Native American Church of Omaha Tribe
Native American Church of the State of South Dakota
Native American Church, Uintah & Ouray Reservation, Northern Ute Tribe
Native American Church of Wyoming
Native American Language Institute
Native American Prisoners' Rehabilitation Research Project
Native American Religious Freedom Project of the Native American Church
Native American Rights Fund
Native Lands Institute
Native Spiritual Cultural Councils, Inc.
Natural Resources Defense Council
Navajo Corrections Project
Navajo Nation (Support in principle)
Nimii'pu (Nez Perce) Tribe
Omaha Tribe of Nebraska and Iowa
Pauma Indian Reservation
Pirtle, Morriset, Schlossur & Ayer
Presbyterian Church U.S.A.
Robinson Rancheria Citizens Business Council
San Juan Southern Paiute Tribe
Sealaska Corporation
Seventh Generation Fund
Sierra Club
Sierra Club, Native American Sites Committee
Spiritual Alliance for Native Prisoners
Student Environmental Action Coalition
Timbisha Shoshone Tribe
Unitarian Universalist Association of Congregations, Washington Office
United Church of Christ, Office for Church in Society
United Methodist Church, General Board of Church and Society
Walapai Tribe
Walk of the Warriors (Native American Veterans)
Wilderness Society
Winds of Life
Wisconsin Tribal Judges Association
Women's International League for Peace and Freedom
Writers Guild of America, West

*** Coalition name has not yet been changed to reflect the Native American Free Exercise of Religion Act of 1993 (S. 1021) which replaces the amendments to AIRFA.**

CASE UPDATES

Alabama-Coushatta v. United States

NARF represents the Alabama-Coushatta Tribe of Texas in its lawsuit against the United States for breach of trust. In *Alabama-Coushatta v. U.S.*, the Tribe is suing the United States for its failure to protect the Tribe's possession of its 9 million acres of aboriginal territory. Oral argument was held on March 3, 1993. On April 8, 1993, the United States Claims Court issued its opinion ruling in favor of the Tribe on most issues, finding that the Tribe did establish aboriginal title by 1830. However, on the critical issue of the extent of the Tribe's aboriginal territory, the court found that the Tribe only held aboriginal title to a very limited area due to the presence of the other tribes. The Tribe will file a notice of appeal and wait for the establishment of a briefing schedule.

Catawba v. United States

The Catawba Tribe filed suit against the United States to recover the value of those lands which the Tribe is barred from claiming as the result of the 1986 Supreme Court decision in the Catawba land claim. In late 1992, the Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of most of the parcels of land on which Summary Judgment had been sought. NARF filed a Petition for a Writ of Certiorari in the United States Supreme Court; that petition was denied. In January 1993, the Court of Appeals for the Federal Circuit affirmed the Claims Court's dismissal of the Tribe's breach of trust and contract claims against the United States. NARF once again filed a Petition for a Writ of Certiorari in the United States Supreme Court on April 6, 1993.

Cheyenne-Arapaho Tribes of Oklahoma v. United States & Woods Petroleum Corp.

NARF represents the Cheyenne-Arapaho Tribe in its suit to overturn the Bureau of Indian Affairs decision to extend the term of tribal oil and gas leases without tribal consent, and at below market value rates. In June 1992, a Tenth Circuit Panel ruled in the Tribe's favor on three of the four disputed oil and gas leases. *The Panel's disposition of the fourth* lease was unclear. The full Tenth Circuit Court declined to rehear the Panel's decision on any of the leases. Both NARF, in the Tribe's behalf, and the oil company filed separate petitions for Writ of Certiorari in the United States Supreme Court seeking review of the Tenth Circuit's rulings. On March 29, 1993, the Supreme Court denied certiorari on both petitions.

Masayesva v. Zah v. James and Navajo Tribe v. United States v. San Juan Southern Paiute Tribe

The United States District Court in Phoenix entered a final judgment on all issues pertaining to the San Juan Southern Paiute and Hopi land claims in December of 1992. The case is now on appeal to the Ninth Circuit Court of Appeals.

NARF RESOURCES AND PUBLICATIONS

The National Indian Law Library

The National Indian Law Library (NILL) has developed a rich and unique collection of legal materials relating to federal Indian law and the Native American. Since its founding in 1972, NILL continues to meet the needs of NARF attorneys and other practitioners of Indian law. The NILL collection consists of standard law library materials, such as law review materials, court opinions, and legal treaties, that are available in well-stocked law libraries. The uniqueness and irreplaceable core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. *Those materials in the public domain* that are non-copyrighted are available from NILL on a per-page-cost plus postage. Through NILL's dissemination of information to its patrons, NARF continues to meet its commitment to the development of Indian law.

Available from NILL

The NILL Catalogue

One of NILL's major contributions to the field of Indian law is the creation of the National Indian Law Library Catalogue: An Index to Indian Legal Materials and Resources. The NILL Catalog lists all of NILL's holdings and includes a subject index, an author-title table, a plaintiff-defendant table and a numerical listing. This reference tool is probably the best current reference tool in this subject area. It is supplemented periodically and is designed for those who want to know what is available in any particular area of Indian law. (1,000+ pgs. Price: $75) (1985 Supplement $10; 1989 Supplement $30).

Bibliography on Indian Economic Development

Designed to provide aid in the development of essential legal tools for the protection and regulation of commercial activities on Indian reservations, this bibliography provides a listing of articles, books, memoranda, tribal codes, and other materials on Indian economic development. 2nd edition (60 pgs. Price: $30). (NILL No. 005166)

Indian Claims Commission Decisions

This 47-volume set reports all of the Indian Claims Commission decisions. An index through volume 38 is also available. The index contains subject, tribal and docket number listing. (47 volumes. Price $1,175). (Index priced separately at $25).

PRICES SUBJECT TO CHANGE

AVAILABLE FROM THE INDIAN LAW SUPPORT CENTER

A Manual for Protecting Indian Natural Resources. Designed for lawyers who represent Indian tribes or tribal members in natural resource protection matters, the focus of this manual is on the protection of fish, game, water, timber, minerals, grazing lands, and archaeological and religious sites. Part I discusses the application of federal and common law to protect Indian natural resources. Part II consists of practice pointers: questions to ask when analyzing resource protection issues; strategy considerations; and the effective use of law advocates in resource protection. (151 pgs. Price $25).

A Manual on Tribal Regulatory Systems. Focusing on the unique problems faced by Indian tribes in designing civil regulatory ordinances which comport with federal and tribal law, this manual provides an introduction to the law of civil regulation and a checklist of general considerations in developing and implementing tribal regulatory schemes. It highlights those laws, legal principles, and unsettled issues which should be considered by tribes and their attorneys in developing civil ordinances, irrespective of the particular subject matter to be regulated. (110 pgs. Price $25).

A Self Help Manual for Indian Economic Development. This manual is designed to help Indian tribes and organizations on approaches to economic development which can ensure participation, control, ownership, and benefits to Indians. Emphasizing the difference between tribal economic development and private business development, this manual discusses the task of developing reservation economies from the Indian perspective. It focuses on some of the major issues that need to be resolved in economic development and identifies options available to tribes. The manual begins with a general economic development perspective for Indian reservations: how to identify opportunities, and how to organize the internal tribal structure to best plan and pursue economic development of the reservation. Other chapters deal with more specific issues that relate to the development of businesses undertaken by tribal governments, tribal members, and by these groups with non-Indian entities. (Approx. 300 pgs. Price $35).

Handbook of Federal Indian Education Laws. This handbook discusses provisions of major federal Indian education programs in terms of the legislative history, historic problems in implementation, and current issues in this radically changing field. (130 pgs. Price $20).

1986 Update to Federal Indian Education Law Manual. ($30) Price for manual and update ($45).

A Manual On the Indian Child Welfare Act and Law Affecting Indian Juveniles. This fifth Indian Law Support Center Manual is now available. This manual focuses on a section-by-section legal analysis of the Act, its applicability, policies, findings, interpretations, and definitions. With additional sections on post-trial matters and the legislative history, this manual comprises the most comprehensive examination of the Indian Child Welfare Act to date. (373 pgs. Price $35).

ANNUAL REPORT. This is NARF's major report on its programs and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations, and to others upon request.

THE NARF LEGAL REVIEW is published by the Native American Rights Fund. Third class postage paid at Boulder, Colorado. Ray Ramirez, Editor. There is no charge for subscriptions.

Tax Status. The Native American Rights Fund is a nonprofit, charitable organization incorporated in 1971 under the laws of the District of Columbia. NARF is exempt from federal income tax under the provisions of Section 501 (c) (3) of the Internal Revenue Code, and contributions to NARF are tax deductible. The Internal Revenue Service has ruled that NARF is not a "private foundation" as defined in Section 509(a) of the Internal Revenue Code.

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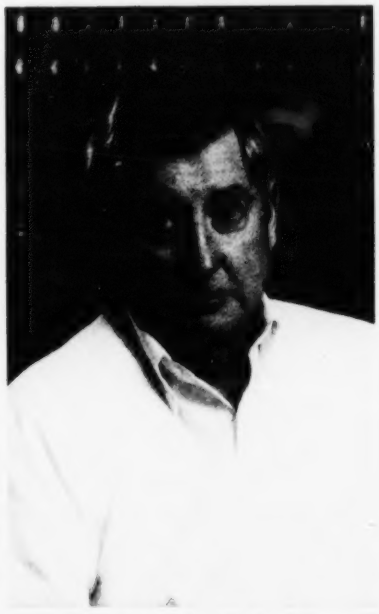
Alaska Office: Native American Rights Fund, 310 K Street, Suite 708, Anchorage, Alaska 99501 (907-276-0680).



Lawrence A. Aschenbrenner
NARF Attorney

NARF ATTORNEY

Lawrence A. Aschenbrenner has been on the NARF staff for over 14 years and has served as the Directing Attorney of the Alaska office for the past 8 years. Larry has over 35 years of litigation experience and previously served as the Directing Attorney for NARF's Washington, D.C. office. He is a graduate of the University of Oregon Law School and did his undergraduate work there as well.

Prior to joining NARF's staff, Larry served in a number of legal capacities, including Acting Associate Solicitor for Indian Affairs and Assistant Solicitor for Indian Affairs in the Department of Interior from 1974 through February 1977. In addition, he has been the Deputy Attorney General for the Navajo Nation 1982-84; Chief Counsel for the Lawyer's Committee for Civil Rights Under Law in Jackson, Mississippi, 1967-69; a partner in a public interest law firm in Oregon; the first Public Defender for the State of Oregon; and District Attorney for Josephine County, Oregon. Larry's legal responsibilities in Indian law have related primarily to issues and cases involving tribal jurisdiction, lands, minerals, hunting and fishing rights, water rights, and the environment.

Native American Rights Fund

The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian rights. The priorities of NARF are: (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5) the development of Indian law.

Our work on behalf of thousands of America's Indians throughout the country is supported in large part by your generous contributions. Your participation makes a big difference in our ability to continue to meet ever-increasing needs of impoverished Indian tribes, groups and individuals. The support needed to sustain our nationwide program requires your continued assistance. Requests for legal assistance, contributions, or other inquiries regarding NARF's services may be addressed to NARF's main office: 1506 Broadway, Boulder, Colorado 80302. Telephone (303) 447-8760.

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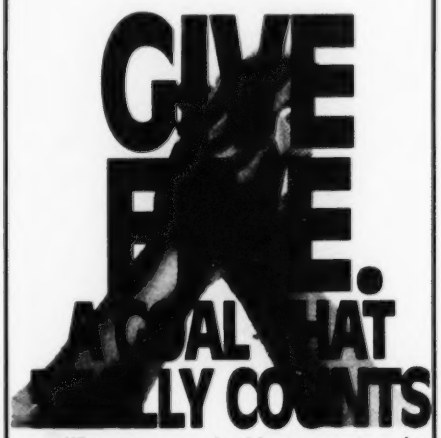

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